Republic Electronics, Inc. and Robert Deasey, Petitioner and Local 918, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-RD-447

20 May 1983

## DECISION AND DIRECTION OF ELECTION

## By Chairman Dotson and Members Jenkins and Hunter

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 29 on 26 October 1982<sup>1</sup> an election by secret ballot was conducted on 19 November among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 16 eligible voters, 15 cast ballots; there were 8 votes for the Union, and 7 against; there were no challenged ballots. Thereafter the Employer filed a timely objection to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation. On 13 January 1983 the Regional Director issued his Report on Objections in which he recommended that the Employer's objection be overruled, and that a Certification of Representative issue. Thereafter, the Employer timely filed exceptions to the Regional Director's report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

- 1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
- 2. The labor organization involved claims to represent certain employees of the Employer.
- 3. There is a question affecting commerce concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
- 4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:<sup>2</sup>

<sup>1</sup> All dates herein are in 1982, unless otherwise indicated.

All production and maintenance employees, including wirers and solderers, production test technicians, inspectors, porters, rework and repair employees, employed by the Employer at its premises at 575 Broad Hollow Road, Melville, N.Y., excluding all other technical and engineering employees, office clerical employees, guards and supervisors as defined by the Act.

The Board has considered the entire record in this proceeding, including the Employer's objection, the Regional Director's report, and the Employer's exceptions, brief, and attached affidavits, and hereby adopts the Regional Director's findings but not his recommendations.

The Employer's objection alleges that Van Wells, an eligible voter, was improperly denied an opportunity to cast his ballot when his supervisor refused his requests to be permitted to vote. Briefly, the Regional Director concluded, on the basis of essentially undisputed facts set forth in affidavit testimony, that the objection should be overruled because Wells' own conduct was instrumental in his not voting. We disagree.

Wells' supervisor, John Genna, testified that several days before the election, Wells asked for time off on 19 November so that he could obtain a driver's license. Genna granted the request, but later realized that the election was scheduled for that day and reminded Wells to return by 11 a.m. to allow enough time to vote. (The polls were scheduled to be open from 11 a.m. until 12 noon on 19 November.)

Janet Anderson, the Employer's personnel manager, testified that the day before the election, 18 November, she gave written schedules to supervisors and asked them to release voters according to those schedules. Anderson explained that because Genna had gone home for the day when the schedules were handed out, she gave the schedule for releasing certain employees, including Wells, to Ron Morton, the production test supervisor.

Wells testified that on 19 November he arrived at work at 11:05 a.m., punched in at the timeclock next to the voting area, went to the maintenance office, and had a cup of coffee. Apparently Morton saw Wells in the area of the Employer's cafeteria where the polls were located and incorrectly assumed that he had voted. At approximately 11:15 a.m., Genna came into the office, and Wells asked when he was supposed to vote. Genna stated that Wells would be called. For the next 15 minutes, Genna and Wells talked about several matters, including the road test for the driver's license. At or about 11:30 a.m., at the conclusion of this conver-

<sup>&</sup>lt;sup>2</sup> The unit appears as set forth in the Stipulation for Certification Upon Consent Election.

sation, Wells again asked Genna when he could vote, and Genna affirmed that Wells would be called. Genna and Wells then began working with the shredding machine. At approximately 11:45 a.m., Wells asked a third time about his being permitted to vote. Genna reiterated that Wells should wait to be called; Genna then left the area. Wells testified that at or about 11:58 a.m., as Genna returned to the shredding machine, Wells told Genna that he had not yet voted. Genna took him to the cafeteria to vote, but by the time they arrived the Board agent in charge of the election was already counting the ballots, and had in fact begun completing the tally of ballots.<sup>3</sup>

The Regional Director noted that the Employer was relying on the actions of one of its own supervisors in challenging the election; that generally such an objection would not be permitted because a party would then be profiting from its own misconduct; and that the Board has carved out an exception to this rule where employees have been disenfranchised through no fault of their own.4 However, the Regional Director concluded that the exception did not apply because Wells' own conduct was instrumental in his not voting. Thus, the Regional Director found that after arriving at work Wells punched in at the timeclock in the area adjacent to the polls and had a cup of coffee rather than going to vote. Further, the Regional Director noted, Wells was aware of the impending close of the polls and failed to take any decisive action such as requesting to speak to the Board agent in charge of the election.<sup>5</sup> Accordingly, the Regional Director determined that the objection should be overruled and a Certification of Representative issue.

The Regional Director correctly stated that, while a party to an election is ordinarily estopped from profiting from its own misconduct, the Board has recognized a limited exception to this rule. Thus, where a party to the election causes an employee to miss the opportunity to vote, the Board will uphold the wrongdoer's objection if the vote is determinative, there is no evidence of bad faith,

and the employee was disenfranchised through no fault of his or her own; i.e., failing to take reasonable steps to attempt to exercise the right to vote. Berryfast, 265 NLRB 82 (1982); Glen McClendon Trucking, above; Cal Gas, above. For example, in McClendon Trucking and Cal Gas, the Board set aside elections where an employer objected that employees were unable to vote because they were away from the polling place in the normal course of their duties for the employer. As we stated in Berryfast, "Our primary concern in these cases [is] with the disenfranchisement of the employees involved, not with any separate . . . claim of reliance upon orderly Board proceedings." Berryfast, 265 NLRB at 82.

It is clear that Wells was prevented from voting by a party to the election, the Employer, who required Wells to continue performing his job rather than vote. Further, there is no evidence of bad faith; rather, it appears that the Employer's actions in preventing Wells from voting resulted from simple misunderstanding. Thus, the focus is on whether Wells took sufficient reasonable steps to attempt to exercise the right to vote. We find that Wells' conduct met this standard.

On the morning of the election, Wells returned to work, got a cup of coffee, and asked his supervisor when he could go and vote. Wells was informed then that he would be called. Two times during this hour Wells again asked when he would be permitted to vote and was told that he should wait to be called. After Wells asked a fourth time to be released to vote, the Employer finally took him to the polls, but it was too late. We find that, in these circumstances, Wells' conduct was reasonable. He repeatedly requested information about voting from his supervisor and was consistently told that he would be given the chance to vote. Furthermore, in light of these assurances, it was not incumbent upon him to demand to speak to the Board agent; rather we find that it was natural for Wells to trust his supervisor's declarations, and to rely on him to follow through on those declarations.

<sup>&</sup>lt;sup>8</sup> Genna's version of the facts differs slightly from the account outlined above. Thus, Genna stated that, after Wells first asked when he could vote, Genna went to the office of William Butler, the director of manufacturing operations, asked what should be done about Wells' request to vote, and was told that Wells would be called, information which he relayed to Wells. Genna also stated that he returned to the shredding machine at approximately 11:59 a.m., and that Wells asked the final time for permission to vote. Finally, Genna indicated that before taking Wells to the polls, he and Wells went to see Butler who instructed them to go to the polling area. We consider these variances to be insubstantial and immaterial to the disposition of the case.

<sup>4</sup> Glenn McClendon Trucking Co., 255 NLRB 1304 (1981); Cal Gas Redding, 241 NLRB 290 (1979).

<sup>&</sup>lt;sup>5</sup> The notice of election, posted several days before the election, invited employees to communicate with the Board agent in charge of the election concerning any questions.

<sup>&</sup>lt;sup>6</sup> See Jobbers Meat Packing Co., 252 NLRB 41 (1980).

<sup>&</sup>lt;sup>7</sup> The Board will, of course, also honor an appropriate objection to such conduct made by the other party or parties to the election. See Kansas City Bifocal Co., 236 NLRB 1663 (1978).

<sup>&</sup>lt;sup>8</sup> The exception is inapplicable where an employee was prevented from voting by sickness, personal activities, or some other unplanned occurrence beyond the control of the parties, the Board, or the employee. For example, in *Versail Manufacturing*, 212 NLRB 592 (1974), the Board upheld the regional director's determination that an employee was not prevented from voting by an action of one of the parties where the employee, an over-the-road truckdriver, took 2 extra days on the road for personal reasons and could not return in time for the election because his trailer was stolen. See also *Wanzer Dairy Div. of the Southland Corp.*, 232 NLRB 631 (1977).

Accordingly, contrary to the Regional Director's recommendation, we hereby set aside the election

held on 19 November 1982 and will direct a second election.

[Direction of Second Election and Excelsior footnote omitted from publication.]